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No. 87-101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STANLEY BOCLAIR,

Appellant,

v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether Illinois Supreme Court Rule 413, Ill. Rev. Stat. ch. 110A, § 413 (1985), as authoritatively construed by the Illinois Supreme Court in this case to allow the State to discover and use as it desires, before trial, handwritten defense investigative notes taken during interviews of State witnesses, is repugnant to the Sixth Amendment right to effective assistance of counsel, because it improperly interferes with defense trial preparation and disregards the work product doctrine articulated by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and *United States v. Nobles*, 422 U.S. 225 (1975), which doctrine is constitutionally required in a criminal case.

2. Whether Illinois Supreme Court Rule 413, Ill. Rev. Stat. ch. 110A, § 413 (1985), as authoritatively construed by the Illinois Supreme Court in this case, is repugnant to the Fifth and Fourteenth Amendments because it (1) grants to the State discovery rights that are broader than those which are afforded the defendant, (2) impairs the ability of a criminal defendant to investigate the facts and present a defense at trial, and (3) requires the defendant to assist the State in the presentation of its case against him.

PARTIES TO THE PROCEEDING

Joel T. Pelz, one of the counsel for defendant at trial, is the real appellant in this case, which involves the propriety of a contempt citation imposed upon Mr. Pelz, who, in his role as defense counsel for Mr. Boclair, challenged the constitutional and statutory validity of the trial court's order requiring pretrial production of defense investigative materials.

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In The

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October Term, 1986

STANLEY BOCLAIR,

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v.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From The Supreme Court Of Illinois

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Illinois (App. A, *infra*, App. 1-6), is not yet reported. The opinion of the Illinois Appellate Court, Fourth District (App. D, *infra*, App. 14-22), is reported at 139 Ill. App. 3d 350, 487 N.E. 2d 969 (1985). The opinion and order of the Circuit Court for Livingston County, Illinois (App. B, *infra*, App. 7-12; App. C, *infra*, App. 13), are not reported.

JURISDICTION

This is an appeal of a civil contempt citation entered against defense counsel for failure to comply with a pretrial discovery order. Defense counsel declined to comply with the order on the ground that the trial court's interpretation of an Illinois state statute, upon which the order was based, was both erroneous, as a matter of Illinois law, and repugnant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The Illinois Appellate Court vacated the contempt order on state law grounds (App. D, *infra*, App. 16-22), but the Illinois Supreme Court reversed and reinstated the contempt citation on February 20, 1987. (App. A, *infra*, App. 6.) A timely petition for rehearing was denied on March 30, 1987. (App. F, *infra*, App. 24.) Appellant filed a notice of appeal on May 26, 1987. (App. G, *infra*, App. 25-26.) This Court has jurisdiction under 28 U.S.C. § 1257(2), because the Illinois Supreme Court's decision upholds the validity of Illinois Supreme Court Rule 413, Ill. Rev. Stat. ch. 110A, § 413 (1985), in the face of a federal constitutional challenge to the Rule as applied to this case. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 355-58 (1977); *In re Griffiths*, 413 U.S. 717, 718 (1973).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rule 413, Ill. Rev. Stat. ch. 110A, § 413, provides in pertinent part:

> Disclosure to Prosecution
>
> * * *
>
> (d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) The names and last known addresses of persons he intends to call as witnesses together

with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and

(ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;

(iii) and if the defendant intends to prove an alibi, specific information as to the place where he maintains he was at the time of the alleged offense.

(e) Additional disclosure. Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule.

Illinois Supreme Court Rule 412, Ill. Rev. Stat. ch. 110A, § 412, provides in pertinent part:

Disclosure to Accused

(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements;

(iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert;

(v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial.

If the State has obtained from the defendant pursuant to Rule 413(d) information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, or at such other time as the court may direct, the names and addresses of witnesses the state intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses by subdivisions (i), (iii) and (vi), above, and a specific statement as to the substance of the testimony such witnesses will give at the trial of the cause.

* * *

STATEMENT OF THE CASE

1. The Trial Court Proceedings.

On November 1, 1984, an indictment for murder was returned against Stanley Boclair in the Circuit Court for Livingston County, Illinois. Both the State and the defendant, through the public defender, filed discovery motions on November 7, 1984. (R. 1.)[1] On November 15, 1984, the State filed its initial discovery response, which included a list of 164 State witnesses. (R. 2.) Supplemental responses increased the number to approximately 225 State witnesses (R. 3, 4), most of whom were inmates or employees of the Pontiac Correctional Center, where the murder took place.

On December 19, 1984, the trial court appointed the law firm of Jenner & Block and attorneys John H. Mathias, Jr. and Joel T. Pelz of that firm as counsel for the defendant and reaffirmed a prior order appointing an investigator to assist with the preparation of the defense. (R. 3.) Thereafter, Mr. Pelz and the defense investigator interviewed many of the State's witnesses. During these interviews, the investigator took notes reflecting the demeanor of the witnesses and certain of the questions and answers. The interviews typically encompassed several hours, and the notes taken summarized only the few portions of the

[1] "R." refers to the common law record on appeal. "Tr." refers to portions of the transcript of proceedings before the trial court that are a part of the record on appeal. "Def. App. Br." refers to the brief filed by the appellant in the Illinois Appellate Court, Fourth District. "Def. Br." refers to the brief filed by the appellant in the Illinois Supreme Court. "Def. Pet. Reh." refers to the petition for rehearing filed by the appellant in the Illinois Supreme Court.

conversations that the defense team believed to be important. (Tr. 80.)

At a hearing on March 14, 1985, the State expanded its earlier discovery request and asked for "notes and memoranda that are being prepared or taken during interviews" of State witnesses. (Tr. 10, R. 5.)[2] The State did not limit its request to those witnesses it actually intended to call, but instead directed the request toward all of the over 200 potential witnesses that it had chosen to name. Defense counsel's objection to this request (Tr. 11-12) was fully briefed by the parties. (R. 9-13, 18-21, 22-24.) Defense counsel argued that the request concerned materials that were not discoverable under Illinois Supreme Court Rule 413; that the materials were subject to well-established work product principles articulated by this Court and by the Illinois Supreme Court; and that production of the notes would violate the defendant's constitutional rights. (R. 11-12, 22-24.)

On May 9, 1985, the trial court held that the State was entitled to pretrial discovery of the notes taken during interviews of State witnesses under "Supreme Court Rule 413(d)(ii) and (e) and the inherent authority of the judiciary to control and regulate the administration of criminal justice." (App. B, *infra*, App. 12.) The trial court rejected defendant's federal constitutional arguments. (App. B, *infra*, App. 9.)

Pursuant to the court's order of May 9, 1985, defense counsel submitted the notes (R. 30) for *in camera* inspec-

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[2] The State knew who was being interviewed because defense counsel was required to notify the Department of Corrections each time he interviewed an inmate or correctional employee, and the Internal Affairs investigator for the Department of Corrections provided this information to the State's Attorney. (Tr. 10.)

tion, and, on May 21, 1985, the trial court ordered the production of virtually all of the notes made with respect to the interviews with potential State witnesses. (App. C, *infra*, App. 13, R. 31.) The court's order did not limit production to materials concerning witnesses who would actually testify, nor did it limit production to materials that might be used for impeachment, which was the only "need" for the notes advanced by the State. (R. 31, Tr. 36-37, 86.) On May 29, 1985, Mr. Pelz, respectfully declined to produce the notes, solely for the purpose of preserving his client's rights, including his right to challenge, on state and federal grounds, the trial court's unprecedented and extraordinarily expansive interpretation of Rule 413. (Tr. 79, 86.) The court held Mr. Pelz in contempt and sentenced him to "six days on conditional discharge conditioned upon [his] performing two hours of public service work." (Tr. 87.) Defense counsel promptly filed a notice of appeal with the Illinois Appellate Court, contesting the contempt citation and challenging the legality and constitutionality of the trial court's expansive discovery order. (R. 34.)

2. The Illinois Appellate Court Proceedings.

In the Appellate Court, defense counsel challenged the trial court's ruling on numerous grounds. Among other things, he argued that the trial court's interpretation of Illinois Supreme Court Rule 413 was repugnant to the Fifth, Sixth, and Fourteenth Amendments because it denied the defendant the effective assistance of counsel, impaired the defendant's due process right to a fair trial, violated his privilege against self-incrimination, and disregarded the work product doctrine, as articulated by this Court in *Hickman v. Taylor*, 329 U.S. 495 (1947), and *United States v. Nobles*, 422 U.S. 225 (1975). (Def. App. Br. 16-20, 27-32.)

On December 12, 1985, the Appellate Court unanimously reversed the discovery order and contempt citation entered by the trial court. (App. D, *infra*, App. 14-22.) The Appellate Court held that Rule 413 does not require the production of these investigative notes, and that the notes were subject to the work product protection articulated in *Hickman* and *Nobles*. (App. D, *infra*, App. 17-21.) The State filed a motion for rehearing, which was denied without opinion on January 16, 1986. (App. D, *infra*, App. 14.)

3. The Illinois Supreme Court Proceedings.

On February 20, 1986, the State filed a petition for leave to appeal to the Illinois Supreme Court. However, the State did not seek to continue the trial or to expedite the appeal. Thus, the trial commenced on April 7, 1986, while the petition for leave to appeal was pending. (Def. Br. 11.) In compliance with the Appellate Court's ruling, defense counsel did not produce the notes prior to trial, but did, during trial, produce the notes pertaining to the 17 State witnesses who actually testified. (Def. Br. 11.) On April 19, 1986, the jury returned a verdict of guilty, and the court sentenced the defendant to death on July 17, 1986. (Def. Br. 11.)

On June 3, 1986, the Illinois Supreme Court granted the State's petition for leave to appeal. The parties fully briefed and orally argued the issues. Defense counsel asserted that to reverse the Appellate Court, thereby reimposing a contempt citation against Mr. Pelz and establishing an interpretation of Rule 413 that would require defense counsel to provide to the State, prior to trial, the fruits of the defense team's investigative efforts, would, among other things, conflict with the Sixth Amendment right to the effective assistance of counsel, the Fifth and Fourteenth Amendment due process guarantee of a fair

trial and the right against self-incrimination, and the work product doctrine, which has constitutional dimensions in the context of a criminal case. (Def. Br. 26-35, 44-51.)

On February 20, 1987, the Illinois Supreme Court reversed the Appellate Court, holding that the trial court properly applied Rule 413(e), which accords the trial court "limited" discretion to order additional discovery from the defendant not set out in the Rule. (App. A, *infra*, App. 5.) The Illinois Supreme Court stated that "the notes are relevant because they will prevent the State from being surprised by the inconsistent statements of its witnesses, and they will allow the State to prepare for impeachment and to rehabilitate its witnesses or restructure its case if necessary." (App. A, *infra*, App. 5.) The Court made no mention of the fact that the trial court's order applied to all State designated "witnesses," even those who would not testify at trial, and was not limited to impeachment material. The Court further held that the notations recorded by the investigator during the interviews with State witnesses were not work product. (App. A, *infra*, App. 6.) The case was ordered remanded to the trial court for enforcement of the contempt citation against Mr. Pelz. (App. A, *infra*, App. 6.)[3]

Although the Illinois Supreme Court explicitly recognized that the defendant properly had raised federal constitutional issues (App. A, *infra*, App. 2), the Court did

[3] In the Illinois Supreme Court, appellant argued that the case was moot, because the underlying criminal trial already had been concluded, and defense counsel had complied with the Appellate Court ruling, which was in effect at the time of trial. (Def. Br. 54-57.) However, the Court rejected that contention, holding that the case was not moot because the contempt order remained to be enforced. (App. A, *infra*, App. 3.)

not specifically address those arguments. Defense counsel petitioned for rehearing, stressing the importance of the issues involved and the likelihood of their arising again in subsequent cases. (Def. Pet. Reh. 11-15.) Defense counsel urged the Court to address the constitutional issues, to explain why it had rejected the principles enunciated in *Hickman v. Taylor* and *United States v. Nobles*, and to explain why it had adopted a rule of law that provides *less* work product protection to a criminal defendant than is available to a party in a civil case under *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E.2d 250 (1982). (Def. Pet. Reh. 5-9.) However, the Court denied the petition without opinion on March 30, 1987. (App. F, *infra*, App. 24.) On April 9, 1987, defense counsel moved to stay the issuance of the mandate, and the Court, by Justice Miller, granted the stay pending the resolution of the case by this Court. (App. H, *infra*, App. 27.) On May 26, 1987, appellant filed a notice of appeal to this Court. (App. G, *infra*, App. 25-26.)

THE QUESTIONS ARE SUBSTANTIAL

This case presents fundamental questions concerning the limitations which the United States Constitution places upon the State's ability to obtain pretrial discovery of criminal defense case preparation materials. Because of the dramatic increase, in recent years, in the number of state law provisions and judicial interpretations requiring criminal defendants to provide pretrial discovery to the prosecution, the virtually unlimited pretrial discovery sanctioned by the Illinois Supreme Court in this case pre-

sents constitutional questions of national importance.[4] These state law provisions and holdings have fundamentally altered the nature of the criminal justice process, but the constitutionality of these alterations has not yet been addressed by this Court. Few issues could be more important than establishing constitutional parameters for determining when a criminal defendant, or his counsel, must provide the fruits of his investigative efforts to the State for use in preparing its case against him. In the absence of guidance from this Court, the federal constitutional right to counsel, the right to due process of law, and the privilege against self-incrimination undoubtedly will continue to vary from state to state.

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[4] Numerous states in their statutes and court rules now allow prosecutorial discovery of defense witness statements before trial. *See, e.g.*, Ariz. R. Crim. P. 15.2(c)(1); Fla. R. Crim. P. 3.220(b)(4)(i); Haw. R. Penal P. 16(c)(2)(i); Ill. S. Ct. R. Crim. P. 413(d)(i), Ill. Rev. Stat. ch. 110A, § 413 (1985); Mass. R. Crim. P. 14(a)(3)(A); Minn. R. Crim. P. 9.02 Subd. 1(3)(b); Mo. R. Crim. P. 25.05(A)(2); Mont. R. Crim. P. 46-15-323(4)(a); N.H. Super. Ct. R. 99; N.J. R. Governing Crim. Prac. 3:13-3(b)(3); N.M. Dist. Ct. R. Crim. P. 28(a)(3); Or. Rev. Stat. § 135.835(1) (1984); R.I. Super. Ct. R. Crim. P. 16(b)(4); Wash. Super. Ct. Crim. R. 4.7(b)(1); Wis. R. Crim. P. 971.24(i).

Five states give the trial court discretion to order the defense to produce, before trial, additional, unspecified materials. *See* Ariz. R. Crim. P. 15.2(f); Ill. S. Ct. R. Crim. P. 413(e), Ill. Rev. Stat. ch. 110A, § 413 (1985); Mo. R. Crim. P. 25.06; Mont. R. Crim. P. 46-15-323(6); Utah Code Ann. § 77-35-16(c) (1982).

Finally, at least two state court rules expressly allow pretrial discovery of State witness interview notes from the defense. *See* Minn. R. Crim. P. 9.02 Subd. 1(3)(b); N.J. R. Governing Crim. Prac. 3:13-3(b)(4). However, the New Jersey Supreme Court declared that, to the extent that the New Jersey rule required pretrial production by defense counsel of his notes of interviews with State witnesses, which would not be discoverable by the State under *Nobles*, unless actually used by the defendant at trial, the rule violated the Sixth Amendment right to the effective assistance of counsel. *State v. Williams*, 80 N.J. 472, 479-81, 404 A.2d 34, 37-39 (1979).

As authoritatively construed by the Illinois Supreme Court, Rule 413 violates the United States Constitution in at least three ways. First, the Rule interferes with defense counsel's pretrial preparation in violation of the defendant's Sixth Amendment right to the effective assistance of counsel. Second, it impermissibly denies a criminal defendant the protection of the work product doctrine, which, in a criminal case, is constitutionally required by the Sixth, Fifth, and Fourteenth Amendments.[5] Third, it deprives the defendant of his Fifth and Fourteenth Amendment rights by affording the State greater discovery rights than it provides the defendant, by interfering with the defense team's access to evidence, and by requiring the defendant to assist the State in the preparation of its case against him.

In addition, the decision of the Illinois Supreme Court conflicts with this Court's prior decisions and with the decision of the highest court of another state. In *United States v. Nobles*, this Court held that an investigator's notes are work product under *Hickman v. Taylor*, which need be produced only when the investigator testifies at trial. Defense counsel in this case repeatedly offered to abide by that procedure. However, the State insisted on more, and the Illinois Supreme Court, inexplicably purporting to rely on *Nobles* as authority (App. A, *infra*, App. 6), approved wholesale, pretrial production of such notes. The decision of the Illinois Supreme Court also

[5] The work product doctrine was established by this Court in *Hickman v. Taylor*. In *United States v. Nobles*, this Court unambiguously held that work product protection is even more important in criminal cases than in civil cases. *See* 422 U.S. 225, 233 (1975). The substantial issue raised in this case is whether, as a matter of federal constitutional law, a state court must provide work product protection to a criminal defendant.

directly conflicts with the New Jersey Supreme Court's decision in *State v. Williams*, 80 N.J. 472, 479, 404 A.2d 34, 37 (1979), which held that a discovery order requiring production of investigative notes that would not be used at trial violates the Sixth Amendment right to counsel. Moreover, the Illinois Supreme Court's decision also grants discovery to the prosecution beyond that authorized in *Wardius v. Oregon*, 412 U.S. 470 (1973), and therefore conflicts with that decision as well.

For all of these reasons, the issues presented by this case clearly are substantial and warrant review by this Court.[6]

I.

THIS CASE RAISES SUBSTANTIAL QUESTIONS UNDER THE ASSISTANCE OF COUNSEL CLAUSE OF THE SIXTH AMENDMENT.

The Illinois Supreme Court authoritatively construed Rule 413 as providing for broad pretrial discovery to the State. The Illinois Supreme Court therefore held that the trial court's discovery order was proper because pretrial

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[6] Should this Court determine that either of the questions presented for review is not within its appellate jurisdiction, appellant respectfully requests that this Court, pursuant to 28 U.S.C. § 2103, treat those issues as if presented in a petition for a writ of certiorari. In the event that this jurisdictional statement is considered as a petition for a writ of certiorari, appellant submits that this case should be regarded as a civil case—because the contempt citation was civil in nature—and thus subject to the 90 day time limit for filing a petition. However, if this Court determines that the issues are not within its appellate jurisdiction, and that the case is criminal in nature, appellant requests that the Court waive the time limit for filing the petition set forth in Rule 20.1 and consider the petition on its merits. *United States v. Mazurie*, 415 U.S. 947 (1974).

disclosure of the interview notes would "prevent the State from being surprised by the inconsistent statements of its witnesses, and they will allow the State to prepare for impeachment and to rehabilitate its witnesses or restructure its case if necessary." (App. A, *infra*, App. 5.)[7] Essentially, the Court held that because defense counsel may have information which the prosecutor does not have, the State is entitled to the fruits of the defense team's efforts, even though the State has equivalent access to the information. That interpretation of Rule 413 cannot be reconciled with the Sixth Amendment right to effective assistance of counsel. *See* U.S. Const. amend. VI; *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).[8]

1. The Illinois Supreme Court Decision Conflicts With Well-Established Sixth Amendment Rights.

On several occasions, this Court has addressed the scope and importance of the Sixth Amendment right to counsel. "[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary fact finding

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[7] Although the Illinois Supreme Court refers to "impeachment" and "witnesses," the trial court's order, which the Supreme Court affirmed, was not limited to impeachment materials, nor was it limited to witnesses who would actually testify at trial.

[8] The interviews involved were of State designated witnesses. Since these "witnesses" were State employees or persons committed to the custody of the State, the prosecutor and the State investigators had greater access to them than did the defense team. However, the State argued that it needed the defense team's notes because the witnesses might be untrustworthy. The questionable character of the State's witnesses cannot serve to justify an erosion of constitutional rights.

process that has been constitutionalized in the Sixth and Fourteenth Amendments." *Herring v. New York*, 422 U.S. 853, 857 (1975). As this Court has recognized, pretrial investigation is "perhaps the most critical period of the proceedings . . . when consultation, thoroughgoing investigation, and preparation [are] vitally important . . . ." *Powell v. Alabama*, *supra*, 287 U.S. at 57. Moreover, "[a]t the heart of the job of 'thoroughgoing investigation and preparation' is the interviewing of prospective witnesses, hostile as well as friendly." *In re Terkeltoub*, 256 F. Supp. 683, 685 (S.D.N.Y. 1966) (footnote omitted). Thus, the Sixth Amendment right to counsel must include the right, indeed the duty, of defense counsel to conduct pretrial investigation. *See Kimmelman v. Morrison*, ____ U.S. ____, ____, 106 S. Ct. 2574, 2588-89 (1986); *see also Strickland v. Washington*, 466 U.S. 668, 685 (1984).[9]

An integral part of trial preparation is the ability of counsel to conduct witness interviews, based on information provided by the defendant, and to freely discuss with the defendant the information obtained and the plans for the defense. As this Court has stated, "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense." *Strickland v. Washington*, *supra*, 466 U.S. at 686 (citations omitted). Indeed, as the Solicitor General has observed in briefs to this Court, " 'the Sixth Amendment's

[9] The right to effective assistance of counsel is even more important in a death-eligible case like the present one. Because of the "qualitative difference" between death and other punishments, the Constitution requires a higher degree of reliability at the guilt stage, *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980), and at the sentencing stage, *Caldwell v. Mississippi*, 472 U.S. 320, 323, 329 (1985).

assistance-of-counsel guarantee can be meaningfully implemented only if a criminal defendant knows that his . . . [attorney's] lawful preparations for trial are secure from the intrusion by the government, his adversary in the criminal proceeding.' " *Weatherford v. Bursey*, 429 U.S. 545, 554 n.4 (1977) (quoting Brief for United States, *Hoffa v. United States*, O.T. 1966, No. 32, at 71, quoted in Brief for United States as *Amicus Curiae* in *Weatherford v. Bursey*, No. 75-1510, at 24 n.13).

As authoritatively construed by the Illinois Supreme Court, Rule 413 limits counsel's right to conduct pretrial investigation and impedes counsel's ability to communicate with and to obtain the confidence of the defendant, a result that is repugnant to the Sixth Amendment.

In effect, Rule 413 now approves and encourages attempts by the State to have defense counsel act as an investigative arm of the State. Such a result cannot help but have a chilling effect on the investigations conducted by defense counsel, and prevents counsel from acting as an advocate for his client. In the case at bar, for example, the State named over 200 "witnesses," but called only 17 as witnesses at trial. Many of the witnesses named but never called were either not interviewed or interviewed only briefly by the State. In requesting pretrial production of the defense interview notes, the State sought to use defense counsel to obtain additional information to bolster its case, and, also, to have defense counsel go out and find out which of the over 200 *potential* witnesses might actually have information helpful to the State, thus permitting the State to have an investigation conducted, without expending its own resources to do so. The Illinois Appellate Court correctly noted that "[t]he State's Attorney has access to each person the defense has interviewed. He is not also entitled to use the effort of defense counsel to shore up weaknesses in his case or to uncover new

avenues of inquiry." (App. D, *infra*, App. 19.) As Justice Jackson perceptively observed, the prosecution was attempting "to perform its functions either without wits or on wits borrowed from the adversary." *Hickman v. Taylor, supra*, 329 U.S. at 516 (Jackson, J., concurring). In addition, of course, pretrial discovery of defense notes greatly increases the likelihood that the State will be able, in its discretion, to require the trial testimony of a defense lawyer or investigator, and to create the unseemly spectacle of pitting the lawyer's or investigator's credibility against that of an occurrence witness. The Illinois Supreme Court has given its imprimatur to this pernicious, and clearly unconstitutional, method of criminal prosecution.

The decision below may make prosecution easier for the State, but it cuts across the constitutional grain of our adversary system of criminal justice and makes a mockery of the right guaranteed by the Sixth Amendment. *See State v. Williams, supra*, 80 N.J. at 479, 404 A.2d at 37.

2. The Illinois Supreme Court Decision Conflicts With This Court's Established Work Product Doctrine, Which, In Criminal Cases, Is Informed And Required By The Constitutional Right To Counsel.

The work product doctrine, as established by this Court in *Hickman v. Taylor* and *United States v. Nobles*, is based upon principles which, in criminal cases, are rooted in the Constitution, and which cannot be ignored without violating constitutional rights.[10] Although neither *Hick-*

[10] A number of federal courts and commentators have recognized that the work product doctrine is constitutionally based, insofar as it relates to criminal cases. *See, e.g., United States v. Felt*, 502 F. Supp. 71, 74 (D.D.C. 1980); *United States v. Amrep Corp.*, 418 F. Supp. 473, 475 (S.D.N.Y. 1976); *In re Terkeltoub*, 256 F. Supp. 683, 685-86 (S.D.N.Y. 1966); Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 Calif. L. Rev. 1567, 1663

(Footnote continued on following page)

man nor *Nobles* was decided on constitutional grounds, appellant submits that this Court should now consider and resolve the constitutional scope of the work product doctrine in a criminal case. Because the decision below directly conflicts with *Hickman* and *Nobles*, and virtually eliminates work product protection in a criminal case, it is contrary to the Sixth Amendment.

In *Hickman*, this Court considered the question whether opposing counsel could discover oral and written statements of witnesses interviewed by counsel in a civil case. The Court answered this question in the negative, stating:

> In performing his various duties, . . . it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways—aptly though roughly termed by the Circuit Court of Appeals in

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[10] *continued*
(1986); Pulaski, *Extending the Disclosure Requirements of the Jencks Act to Defendants: Constitutional and Nonconstitutional Considerations*, 64 Iowa L. Rev. 1, 29 n.155 (1978); Allis, *Limitations on Prosecutorial Discovery of the Defense Case in Federal Courts: The Shield of Confidentiality*, 50 S. Cal L. Rev. 461, 507-10 (1977). The principal constitutional aspect of work product is in the Sixth Amendment right to counsel, but there are Fifth and Fourteenth Amendment due process and self-incrimination aspects to the doctrine as well. *See* pp. 23-26 & n.14, *infra*.

> this case as the "work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman v. Taylor, supra, 329 U.S. at 510-11. As the Court more recently has observed, "[t]he *Hickman* work product doctrine was founded upon the private attorney's role as the client's confidential advisor and advocate, a loyal representative whose duty it is to present the client's case in the most favorable possible light." *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984).

In applying the *Hickman* principle to federal criminal cases, the Court recognized in *United States v. Nobles, supra*, 422 U.S. at 238 (footnote omitted; emphasis added), that "the work-product doctrine['s] . . . role in assuring the proper functioning of the criminal justice system is *even more vital* [than in civil cases]. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case."[11] In a criminal trial,

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[11] Moreover, as the court noted in *In re Terkeltoub, supra*, 256 F. Supp. at 685:

> The ultimate interest to be protected is the privacy and confidentiality of the lawyer's work in preparing the case. It is the violation of that interest that is held offensive to the Constitution in the cases of eavesdropping and spying. The protection would be a thin illusion if the Government could have for the asking what it has, in rare lapses, sought by less genteel means.

the role and performance of defense counsel are measured by constitutional standards. To ensure that the rights of an accused are adequately protected, the work product doctrine must be deemed constitutionally required in criminal cases.

In *Nobles*, defense counsel was allowed at trial to question the State's witnesses concerning what they had told the defense investigator. Even though this questioning suggested that the State witnesses had given prior inconsistent statements, the trial court did not order the production of the investigator's notes at that time. Instead, the trial court ruled that a portion of the investigator's report, limited to impeaching statements, would have to be produced only if the investigator actually took the stand. When defense counsel declined to produce the excerpts of the notes, the trial court ruled that the investigator could not testify.

In affirming the trial court's ruling in *Nobles*, this Court noted that:

> The court authorized no general "fishing expedition" into the defense files or indeed even into the defense investigator's report. Rather, its considered ruling was limited in scope, opening to prosecution scrutiny only the portion of the report that related to the testimony the investigator would offer to discredit the witnesses' identification testimony.

United States v. Nobles, supra, 422 U.S. at 240 (citation omitted). This Court recognized that the witness interview notes were privileged, but held that the privilege would be deemed to have been waived when the defendant chooses to call the investigator as a witness. *Id.* at 239. This is precisely the procedure that defense counsel, in the case at bar, repeatedly expressed his willingness to follow; it is pre-

cisely the procedure that the Illinois Appellate Court approved (App. D, *infra*, App. 20-21), and the procedure that the Illinois Supreme Court rejected.

Because *Nobles* limits discovery to the time of trial and then allows, not a "fishing expedition," but only discovery of material as to which the work product privilege has been waived, it does not stunt investigative efforts by the defense team. Thus, the *Nobles* procedure protects the Sixth Amendment right of an accused to the effective assistance of counsel. At the same time, it accommodates the State's interest in seeking the truth, because it prevents defense counsel from presenting "half-truths" by utilizing only the exculpatory portions of the notes. The decision below upsets this careful balance, which this Court set in *Nobles*. By abandoning the *Nobles* procedure and allowing unlimited pretrial production of investigative materials, the decision below creates a rule which gives no weight whatever to the Sixth Amendment interests at issue.[12]

Moreover, even if this Court were to decline to constitutionalize the work product doctrine, it is nonetheless clear that the Illinois Supreme Court's construction of Rule 413 results in such a gross departure from the well-established role of criminal defense counsel that it violates the Sixth Amendment rights of the accused. The decision

[12] The State here demonstrated no particularized need for pretrial discovery. As Justice White stated in *Nobles*, "[i]n the main, where a party seeks to discover a statement made to an opposing party in order to *prepare* for trial, he can obtain the 'substantial equivalent . . . by other means,' Fed. Rule Civ. Proc. 26(b)(3), *i.e.*, by interviewing the witness himself." *United States v. Nobles*, *supra*, 422 U.S. at 248 (White, J. concurring) (emphasis in original). That is especially true in this case, where the interview notes relate to the State's own witnesses.

below compels defense counsel to produce handwritten witness interview notes to the State for any use whatever, including further investigation and trial preparation. This procedure exemplifies the "fishing expedition" which was condemned by this Court in *Nobles* and is repugnant, in any event, to the Constitution. The Illinois Supreme Court's abandonment of fundamental Sixth Amendment principles warrants review by this Court.

II.

THIS CASE INVOLVES SUBSTANTIAL QUESTIONS UNDER THE FIFTH AND FOURTEENTH AMENDMENT DUE PROCESS AND SELF-INCRIMINATION CLAUSES.

The Illinois Supreme Court's construction of Rule 413 raises serious constitutional issues under the Fifth and Fourteenth Amendments which should be addressed by this Court. First, it violates due process because it accords the State pretrial discovery more expansive than that which is granted to an accused by Rule 412. Due process requires, at a minimum, that an accused receive equal discovery rights. *See Wardius v. Oregon, supra*, 412 U.S. at 475.

Under Supreme Court Rule 412, the State need only produce to the defendant "substantially verbatim reports" of its own witnesses. As construed by the Illinois Supreme Court in the decision below, Rule 413 goes beyond this and requires that the defendant produce impressionistic summaries of interviews with the prosecution's witnesses. This imbalance in discovery, tilted toward the State, violates the due process standard articulated in *Wardius*.

Moreover, the particular facts of this case further demonstrate the constitutional impropriety of the State's discovery request and of the court's approval of that request.

Although defense counsel produced handwritten notes for court inspection, the State produced only typewritten summaries of its investigator's interview notes.[13] What was deleted from the originals by way of text, organization, emphasis, marginal notations, and the like, will never be known. Moreover, even after a trial court order requiring production of handwritten notes (Tr. 12), the State investigators continued to destroy them. Thus, it is clear that the trial court's order did not constitute reciprocal discovery. Whether the Illinois Supreme Court's approval of such blatant efforts by the prosecution to obtain additional advantages in a criminal case should be allowed under the federal Constitution is an issue that should be addressed by this Court.

In addition, the decision of the Illinois Supreme Court upsets the traditional adversarial balance because it fails to consider that the State has the distinct advantage of having vast investigatory resources at its disposal. *See Wardius v. Oregon, supra,* 412 U.S. at 475 n.9. This fact has led this Court to conclude that "the State's inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant's favor." *Id.* The rule established by the Illinois Supreme Court's decision gives effect to the polar opposite of that sound, and constitutionally necessary, principle. The system of criminal discovery endorsed by the Illinois Supreme Court, which shifts the balance in favor of the State, violates due process.

Second, the decision below violates due process for the additional reason that it sanctions governmental interfer-

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[13] The State's Attorney stated that he did not take notes because he did not want to produce them. (Tr. 14.)

ence with defense counsel's pretrial investigation. As this Court recognized in *California v. Trombetta*, 467 U.S. 479, 486 (1984), the government "transgress[es] [due process] limitations if it exercise[s] its sovereign power so as to hamper a criminal defendant's preparation for trial." Accordingly, where, as here, the government interferes with the defense's access to evidence, it violates due process. *See, e.g., id.* at 485; *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982); *United States v. Marion*, 404 U.S. 307, 325-26 (1971). The discovery rule upheld by the Illinois Supreme Court discourages defense counsel's efforts to interview State witnesses, and places an unwarranted premium upon defense counsel's failure to take notes of such interviews (*see Hickman v. Taylor, supra*, 329 U.S. at 510-11), thus impeding the defendant's preparation for trial and violating due process.

Finally, the decision below also violates a defendant's right against compelled self-incrimination. By talking with counsel about whom to interview and what kinds of questions to ask, the defendant can only work against his own interests and in furtherance of the prosecutorial machinery of the State. The already difficult task of securing the confidence of a criminal defendant necessarily will be exacerbated if the accused has good cause to view the public defender or court-appointed counsel, not as a fearless advocate on his behalf, but as an effective, if unwilling, conduit for the transmission to the State of the accused's most efficacious thoughts about his own defense. Such court ordered assistance to the State violates the command of the Fifth Amendment that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend V. The rule established by the decision below cannot pass constitutional muster because "it requires a defendant to disclose information to

the State so that the State can use that information to destroy him." *Williams v. Florida*, 399 U.S. 78, 111 (1970) (Black, J. dissenting); *see In re Misener*, 38 Cal. 3d 543, 698 P.2d 637 (1985).[14]

The Illinois Supreme Court's authoritative construction of Rule 413 threatens not only the due process and self-incrimination rights of the accused, but also the very integrity of our adversary system of criminal justice. To protect this defendant, and future defendants, and to ensure that defense counsel is not wrongfully punished for protecting his client's constitutional rights, this Court should grant plenary review and declare that Rule 413, as construed and applied by the Illinois Supreme Court, is unconstitutional.

III.

THE ILLINOIS SUPREME COURT DECISION DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER STATE SUPREME COURT CONCERNING THE SIXTH AMENDMENT RIGHT TO COUNSEL.

If this Court should determine that this appeal does not lie within its appellate jurisdiction (*see* p. 14 n.6, *supra*), this jurisdictional statement should be treated as a petition for a writ of certiorari, which should be granted to resolve the conflict between the decision below and

[14] The total disregard of the work product doctrine in this case also impairs due process and self-incrimination rights. Pretrial investigation is essential to an effective defense and a fair trial. The work product doctrine, which was eviscerated by the Illinois Supreme Court in this case, provides the protection necessary to accord the defense team an opportunity to prepare a defense, without contributing the fruits of its labors to the prosecution. Thus, it is constitutionally required by the Fifth Amendment.

the New Jersey Supreme Court's decision in *State v. Williams*. In *Williams*, the Court considered the precise issue presented in this case, *i.e.*, the propriety of a discovery order that compels the defense to produce, prior to trial, investigative notes taken from interviews of State witnesses. The New Jersey Court expressly endorsed the *Nobles* procedure and held that a general order requiring defense counsel to turn over his notes of interviews with State witnesses, which the defense did not intend to use at trial, violated the Sixth Amendment guarantee of effective assistance of counsel. The Court reasoned:

> To hold otherwise would infringe on a defendant's constitutional right to the effective assistance of counsel because of the chilling effect it would have on defense investigation. Defense counsel would be hesitant to make an in-depth investigation of the case for fear that inculpatory material would be disclosed which might have to be turned over to the State.

State v. Williams, supra, 80 N.J. at 479, 404 A.2d at 37; *see State v. Melvins*, 155 N.J. Super. 316, 320-22, 382 A.2d 925, 927-28 (App. Div. 1978) (pretrial production of expert reports must be limited to those that will be used at trial).

The Illinois Supreme Court's decision completely fails to address the constitutional concerns that the New Jersey Supreme Court found dispositive, and it places defense counsel in the untenable position of having to choose between three pernicious alternatives: (1) choosing not to interview witnesses, (2) refraining from taking any notes during interviews, or (3) assisting the State with the preparation of its case by turning over interview notes to the State, and, possibly, being called by the State to testify at trial in an unseemly swearing contest with an occurrence witness. None of these alternatives is constitutionally acceptable, and each interferes with the defendant's Sixth

Amendment right to the effective assistance of counsel. The holding and reasoning of the New Jersey Supreme Court are persuasive, and the conflict with the decision below demonstrates the necessity for further guidance from this Court on this issue.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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Dated: June 26, 1987

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APPENDIX A

Docket No. 63132—Agenda 7—November 1986.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellant, v. STANLEY BOCLAIR, Appellee.

JUSTICE RYAN delivered the opinion of the court:

In the case giving rise to this appeal, Stanley Boclair was charged with four counts of murder in the circuit court of Livingston County. While preparing his defense, defendant's court-appointed counsel and investigator interviewed many persons who were listed by the State as potential prosecution witnesses. During the course of pretrial discovery, the State requested discovery of the notes taken during these interviews by the defendant's investigator. When defendant's attorney refused to turn the notes over to the State, as ordered by the trial court, he was held in contempt of court. The appellate court reversed the trial court's pretrial discovery order and the contempt citation (139 Ill. App. 3d 350), and we granted the State's petition for leave to appeal. We now reverse the appellate court and affirm the trial court's contempt citation.

On November 1, 1984, defendant was charged with four counts of murder in connection with an incident that occurred while he was an inmate at Pontiac Correctional Center. Pursuant to defendant's trial on these charges, pretrial discovery motions were filed by both defendant and the State. In response to defendant's request for a list of the State's witnesses, the State listed over 200 potential witnesses, most of whom were inmates or employees of Pontiac Correctional Center. Both the State and defendant requested discovery of memoranda and

notes of the other's investigators that reflected oral statements given by a witness or a potential witness, pursuant to Supreme Court Rules 412(a) and 413(d) (87 Ill. 2d Rules 412(a), 413(d)).

At two hearings held before the trial court, defendant objected to the State's request that he produce notes of his investigator that were prepared during interviews of State witnesses. Defendant argued that the notes were not subject to pretrial discovery under Rule 413, that they were work product, and that his constitutional rights would be violated if he was required to produce the notes.

The trial court concluded that the notes were discoverable under Rules 413(d)(ii) and (e). The court ordered defendant to produce the notes for an *in camera* inspection to determine which, if any, portions of the notes were protected work product. The trial court inspected the notes, high-lighted the discoverable portions, and ordered those portions produced. Defense counsel refused to produce the notes as ordered, and he was held in contempt and sentenced to "six days on conditional discharge conditioned upon [his] performing two hours of public service work."

Defendant's counsel sought review before the appellate court, and defendant's trial was continued pending the appellate court's decision. The appellate court reversed, concluding that production of the notes was not required under Rule 413, and that the notes were privileged under the work product rule (87 Ill. 2d R. 412).

The State then filed its petition for leave to appeal to this court but did not seek a continuance of the trial or an expedited appeal. The underlying criminal action proceeded to trial and defendant was found guilty. The defense investigator's notes were produced at trial in accordance with the appellate court's decision.

The threshold question in this case is whether the issues raised by the parties are moot. Counsel argues that since the notes were produced at trial, and since defendant has been tried and convicted, this case is moot.

This court has held that a reviewing court must dismiss a pending appeal where the court has notice of facts which make it impossible to grant effective relief to either party. (*George W. Kennedy Construction Co. v. City of Chicago* (1986), 112 Ill. 2d 70, 76.) We will not render an opinion when it would have only an advisory effect. (*People ex rel. Black v. Dukes* (1983), 96 Ill. 2d 273, 276.) A case is considered moot when it "presents or involves no actual controversy, interests or rights of the parties, or where the issues have ceased to exist." *People v. Redlich* (1949), 402 Ill. 270, 278-79.

In the instant case, defendant's attorney was cited for contempt for refusing to turn over designated portions of his investigator's notes to the State prior to trial. This was a civil contempt (see *People ex rel. Kazubowski v. Ray* (1971), 48 Ill. 2d 413, 416, *cert. denied* (1971), 404 U.S. 818, 30 L. Ed. 2d 118, 92 S. Ct. 78), which could be purged by compliance with the terms of the trial court's order. (*Continental Illinois National Bank v. Brach* (1979), 71 Ill. App. 3d 789, 792-93). While it appears that defendant's attorney did in fact produce the investigator's notes relating to actual witnesses during the trial, this production was not in compliance with the trial court's order to produce all designated notes prior to trial. Counsel did not purge himself of contempt, and the contempt order, with its attendant sentence, remains to be enforced.

The trial court ordered defendant's attorney to produce his investigator's notes on the basis of Rules 413(d)(ii) and (e) and the inherent authority of the judiciary to control and regulate the administration of criminal justice. Since our adoption of Rule 413 has removed pretrial discovery

by the prosecution from the purview of the trial courts' discretionary authority (*People v. Williams* (1981), 87 Ill. 2d 161, 165; *People v. Elbus* (1983), 116 Ill. App. 3d 104, 107), we consider only the statutory arguments.

The goals of pretrial discovery in a criminal trial are to promote the search for truth and to eliminate surprise as a trial tactic. (*People v. Rayford* (1976), 43 Ill. App. 3d 283, 286.) The same underlying goals are served both by discovery against the prosecution and by discovery against the defense. (See Zagel & Carr, *State Criminal Discovery and the New Illinois Rules*, 1971 U. Ill. L.F. 557, 584.) Rule 413 allows for broad disclosure to the prosecution subject to constitutional limitations in favor of the defendant, most commonly the privilege against unreasonable searches and seizures and the privilege against self-incrimination.

The State contends that the defense investigator's notes are discoverable under Rule 413(d)(ii), which provides that the defense must furnish the prosecution with "any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial." (87 Ill. 2d R. 413(d)(ii).) We reject this interpretation and agree with the appellate court, which concluded that the word "papers" cannot be defined so broadly as to include the investigative notes at issue in this case.

The State also urges us to allow discovery of the defense investigator's notes under Rule 413(e). Rule 413(e) provides as follows:

> "Additional disclosure. Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule." (87 Ill. 2d R. 413(e).)

Under this rule, the trial court has limited discretion to order disclosure of relevant material to the State. The appellate court concluded that Rule 413(e) should be given a limited reading and, since the defense investigator's notes were only relevant if the investigator testified to impeach a State witness, application of the rule was not appropriate in this case.

Rule 413(e) allows the trial court to order additional discovery not covered in other sections of the rule. (See 87 Ill. 2d R. 413, Committee Comments.) While the scope of the court's discretion was intended to be limited (see *People v. Manley* (1974), 19 Ill. App. 3d 365, 370), we conclude that its application was appropriate in this case. Contrary to the appellate court's conclusion regarding the relevance of the investigator's notes, their use would not be limited to refreshing the defense investigator's recollection. In fact, the notes are relevant because they will prevent the State from being surprised by the inconsistent statements of its witnesses, and they will allow the State to prepare for impeachment and to rehabilitate its witnesses or restructure its case if necessary. Since the defense investigator's notes were material and relevant to the legitimate ends of discovery, we conclude that the trial court did not abuse its discretion by ordering discovery of the notes. See *People v. Lego* (February 20, 1987), No. 59908.

Defendant's counsel also argues that the investigator's notes are protected from discovery by the work-product privilege. On this issue, the appellate court agreed that the notes were protected under Rule 412(j)(i). The work-product rule provides that disclosure "shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the State or members

of its legal or investigative staffs, or of defense counsel or his staff." 87 Ill. 2d R. 412(j)(i).

While we recognize that the work-product rule exists to protect the mental processes of an attorney and his investigators, we note that the privilege is not absolute. (*United States v. Nobles* (1975), 422 U.S. 225, 239, 45 L. Ed. 2d 141, 154, 95 S. Ct. 2160, 2170.) We outlined the scope and operation of the work-product rule in *People v. Szabo* (1983), 94 Ill. 2d 304. In *Szabo*, we concluded that handwritten notes taken during an interview with a witness are not work product *per se*. Instead, we stated that "the determination whether memoranda summarizing a witness' oral statements consist of or contain privileged material is to be made by the court." *People v. Szabo* (1983), 94 Ill. 2d 327, 344.

In the case at bar, defendant's investigator's notes were examined *in camera* by the trial court. As required by *Szabo* (see also *People v. Bassett* (1974), 58 Ill. 2d 285, 292), the trial court excised irrelevant and privileged matter, and ordered defendant to turn over only the portions of the notes that contained factual statements which could "fairly be said to be the witness' own words." (*People v. Szabo* (1983), 94 Ill. 2d 327, 345.) Therefore, we conclude that the work-product rule was not violated.

The judgment of the appellate court is reversed. The cause is remanded to the circuit court of Livingston County for the enforcement of its contempt order.

Reversed and remanded.

JUSTICE SIMON took no part in the consideration or decision of this case.

Entered: February 20, 1987

APPENDIX B

STATE OF ILLINOIS In The Circuit Court Of The
COUNTY OF LIVINGSTON—ss Eleventh Judicial Circuit

THE PEOPLE OF THE STATE OF ILLINOIS

vs. No. 84-CF-151

STANLEY BOCLAIR.

ORDER

This cause has come on for hearing upon the motion of the State's Attorney to discover certain reports made by an investigator, Anthony Matens, who was employed by the defense counsel, Joel T. Pelz, to conduct interviews with persons listed upon the People's response to the defendant's Motion for Discovery.

The Indictment in this case alleges offenses committed in the Pontiac Correctional Center on October 7, 1984. The People, in response to the defendant's Motion for Discovery, listed numerous (approximately 141) prison inmates as possible prosecution witnesses. Mr. Pelz, acting as pro bono defense counsel, sought the court's consent to retain the services of an investigator to interview the witnesses and to make a report of his investigation to defense counsel. The court allowed the motion, and authorized the expenditure of public funds to hire an investigator to assist Mr. Pelz in investigating this case. Mr. Matens went out to the Pontiac Correctional Center and to other correctional centers around the State of Illinois to interview the witnesses. After each interview, he prepared a report to Mr. Pelz in which he summarized the areas of evidence in which the witness might possess

knowledge and might be expected to testify. The reports also purportedly contained comments relating to Mr. Matens' assessment of the credibility of the witnesses, in some cases including evidence of the witnesses' prior convictions. The State's Attorney has sought to discover these reports.

The credibility of inmate witnesses is a very crucial concern in the trial of any offense alleged to have been committed within a correctional center because of several factors not present in most other types of criminal litigation. First, virtually every prison inmate is subject to impeachment by virtue of his prior conviction of one or more infamous crimes. Second, virtually every prison inmate is desirous of obtaining his release as soon as possible. He is therefore subject to possible manipulation with regard to his testimony in order to gain favor with the prison administration by appearing to be cooperative with the prosecution. He thereby hopes to gain an early release from the Department of Corrections, transfer to a less restrictive institution, or some other privilege or advantage which the administration may be able to bestow. Finally, virtually every prison inmate is subject to threats of harm or other forms of intimidation from individual inmates or from prison gangs to an extent not likely to be experienced by a non-inmate witness. With these factors in play, it is little wonder that such witnesses are more likely than most to make inconsistent statements to several investigators who may interview them with respect to a particular event.

For this reason, the court believes that the People have made a strong case for the discovery or such reports. Moreover, the court believes that the criminal judicial process should be a search for the truth, and that the broadest latitude for discovery of evidence in advance of trial will enhance the truth-seeking process.

The first step in resolving a question relative to the scope of discovery is to determine whether the material sought to be discovered is privileged. *Consolidated Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E. 2d 250 (1982). In the situation presented by this case, there are two privileges which must be considered. The first privilege is of constitutional dimension. The Fifth Amendment to the Constitution of the United States establishes the privilege against self-incrimination. The Fifth Amendment is intended to protect the "private inner sanctum of individual feeling and thought and proscribes state intrusion to extract self condemnation". *United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975); *Couch v. United States*, 409 U.S. 322, 34 L. Ed. 2d 548, 93 S. Ct. 611 (1973). It appears to the court that disclosure of relevant portions of a defense investigator's report does not infringe upon the fundamental values protected by the Fifth Amendment. *United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975).

The second privilege which has to be considered is the work product privilege. In *Consolidated Coal Co. v. Bucyrus-Erie Co.*, 89 Ill. 2d 103, 432 N.E. 2d 250 (1982) the Supreme Court of Illinois recognized that attorney's notes and memoranda of oral conversations with witnesses are not routinely discoverable because they necessarily reveal, in varying degrees, the attorney's mental processes in evaluating the communications. Illinois Supreme Court Rule 412 has extended that precept of civil discovery to discovery in criminal cases. Illinois Supreme Court Rule 412(j) provides that records, correspondence, reports, and memoranda containing opinions, theories, or conclusions of defense counsel, or his staff, are not subject to discovery under the Supreme Court Rules. The People have cited to the court the case of *People v. Grier*, 90 Ill. App. 3d 840, 413 N.E. 2d 1316 (1980), for the proposition

that such reports are discoverable. However, a closer examination of the case of the *People v. Grier*, 90 Ill. App. 3d 840, 413 N.E. 2d 1316 (1980), shows that the court went to some length to avoid deciding the question of pre-trial discovery of such documents; the court simply upheld the order of the trial court requiring defense counsel to furnish to the People defense counsel's reports of interviews with defense witnesses, after such witnesses had been called to testify on direct examination by the defense, in order to facilitate the cross-examination of such witnesses by the prosecution.

The court finds that the reports of Mr. Matens' interviews with witnesses listed upon the People's Motion for Discovery certainly do not invade the private inner sanctum of individual feeling and thought of the defendant and that they are not privileged under the Fifth Amendment to the Constitution of the United States. The court further finds that to the extent such reports contain the opinions, theories, or conclusions of Mr. Matens relative to trial strategy or credibility of witnesses, such reports are privileged from discovery under the work product exception in Supreme Court Rule 412 (j). To the extent that such reports contain the statements of witnesses concerning the alleged event, it appears that those portions of such reports fall outside of the work product exception. The court therefore concludes that certain portions of Mr. Matens' reports are constitutionally subject to discovery by the opposition. However, the People must show more than the possibility that some portions of the reports are subject to discovery. They must show that they have a legal right to discover those portions of the reports which are not privileged. Ordinarily the right to discovery flows from one or more of three sources: statutes, court rules, or the inherent authority of the court.

The statutes of the State of Illinois do not provide for discovery to be furnished by the defense to the People. S.H.A. ch. 38, §114-9. However, Supreme Court Rule 413 does. It provides:

> "Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following materials and information within his possession or control:
>
> (i) the names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and
>
> (ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;
>
> . . . . . .
>
> (e) Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule." S.H.A. ch. 110A, § 413(d)(i)(ii)(e).

Supreme Court Rule 413(d)(i) clearly does not relate to the discovery of statements made by prosecution witnesses. It would apply only to statements made by witnesses on the People's list whom the defense also intended to call. If the defense intended only to cross-examine such persons, when called as People's witnesses, then the duty to disclose their statements under Supreme Court Rule 413(d)(i) would not come into play. However, Supreme Court Rule 413(d)(ii) does require production of papers or documents the defense intends to use for impeachment at trial.

Moreover, the United States Supreme Court has recognized the inherent authority of the Judicial Branch of the government to require the defense to produce previously recorded statements of witnesses to assure the People of the full benefit of examination and cross-examination of witnesses and to enhance the truth-finding process. *United States v. Nobles*, 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160 (1975).

The court finds that Supreme Court Rule 413(d)(ii) and (e) and the inherent authority of the judiciary to control and regulate the administration of criminal justice both furnish a proper basis upon which the right of the People to discover such reports may properly be founded.

Where the discoverable statements of witnesses and the opinions, theories and conclusions of the defense counsel and his agent are intertwined in the same documents, Supreme Court Rule 415(f) permits an *in camera* inspection by the court in order to separate the two types of material from each other, and Supreme Court Rule 415(e) authorizes excision of work product and other privileged matter.

IT IS THEREFORE ORDERED by the court that the defendant submit the reports of Mr. Matens of his interviews with the witnesses listed upon the prosecution's answer to the defendant's Motion for Discovery to the court for an *in camera* inspection for the purpose of determining whether any portion of the contents of those reports are discoverable under the principles hereinabove discussed on May 15, 1985.

DATED THIS 9th DAY OF MAY, 1985

/s/ William T. Caisley
JUDGE

APPENDIX C

STATE OF ILLINOIS In The Circuit Court Of The
COUNTY OF LIVINGSTON—ss Eleventh Judicial Circuit

THE PEOPLE OF THE STATE OF ILLINOIS

vs. No. 84-CF-151

STANLEY BOCLAIR.

ORDER

Now come the defendant by counsel into Open Court and presents the investigative notes of Tony Matens for *in camera* inspection. And the court, having inspected the notes of Mr. Matens, orders that the names of the persons interviewed and the orange highlighted portions of the interview be furnished by the defense to the prosecution as part of discovery prior to the start of trial.

DATED THIS 21st DAY OF MAY, 1985

/s/ William T. Caisley
JUDGE

APPENDIX D

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee, v.
STANLEY BOCLAIR, Defendant-Appellant.

Fourth District No. 4-85-0384

Reversed and remanded.

Opinion filed December 12, 1985.—Rehearing denied January 16, 1986.

Appeal from the Circuit Court of Livingston County; the Hon. William T. Caisley, Judge, presiding.

John H. Mathias, Jr., and Joel T. Pelz, both of Jenner & Block, of Chicago, for appellant.

Donald D. Bernardi, State's Attorney, of Pontiac (Robert J. Biderman and Gwendolyn Klingler, both of State's Attorneys Appellate Service Commission, of counsel), for the People.

JUSTICE MORTHLAND delivered the opinion of the court:

On November 1, 1984, an indictment charged defendant Stanley Boclair with four counts of murder. The trial court appointed the public defender to represent the defendant, along with an investigator to assist defense counsel. Subsequently, the public defender withdrew as counsel and the court appointed the law firm of Jenner & Block

to represent the defendant. The investigator continued to assist the new defense counsel in preparing for trial.

Both the prosecution and the defense filed motions for discovery. The People's response to the defendant's discovery request ultimately produced the names of more than 200 potential prosecution witnesses. Jenner & Block attorney Joel T. Pelz, the defendant's counsel, commenced interviewing many of these prosecution witnesses with the assistance of the court-appointed investigator. The State had similarly requested the names of defense witnesses along with "their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements." At a hearing on March 14, 1985, the State expanded this discovery request to include "notes and memoranda that are being prepared or taken during [defense] interviews" of witnesses originally named by the State. Defense counsel objected to this expanded request, and a second hearing was held on March 28, 1985.

1. On May 9, 1985, the court ruled that pursuant to "Supreme Court Rule 413(d)(ii) and (e) and the inherent authority of the judiciary to control and regulate the administration of criminal justice," the State was entitled to discover the interview notes. The court ordered defense attorney Pelz to submit the reports for *in camera* inspection. The trial judge inspected the reports and highlighted those portions which he believed were relevant and did not contain impressions or characterizations of the individuals who were interviewed. The trial court then ordered Pelz to turn over to the State's Attorney the highlighted portions of the reports. The court noted that in reviewing the reports, it had no knowledge of what might be impeaching material. Mr. Pelz refused to deliver the notes to the prosecution, asserting they contained protected "work product" and were not discoverable by the

prosecution under Supreme Court Rule 413 (87 Ill. 2d R. 413). The trial court held attorney Pelz in contempt of court, sentencing him to six days' conditional discharge. Mr. Pelz appeals from the contempt holding.

On appeal, Pelz reasserts his arguments that Supreme Court Rule 413 does not require him to turn over the investigator's reports during pretrial discovery and that the reports contain protected work product. In addition, Pelz claims that forcing him to turn over the reports would violate his client's rights of effective assistance of counsel and due process. He also asserts that Rule 413 was enacted in violation of the separation of powers doctrine. We agree with the appellant that these reports are work product. Likewise, they are not discoverable before trial pursuant to Supreme Court Rule 413 under the facts of this case. However, since the appellant did not raise his constitutional arguments at the trial court, those issues are not properly before this court and are waived. *People v. Amerman* (1971), 50 Ill. 2d 196, 279 N.E.2d 353.

2. Initially, we note that the supreme court rules on discovery intend to supplant the trial court's inherent jurisdiction over the criminal justice process during the pretrial stages. (*People v. Grier* (1980), 90 Ill. App. 3d 840, 413 N.E.2d 1316; see also *Bruske v. Arnold* (1969), 44 Ill. 2d 132, 254 N.E.2d 453.) Accordingly, the trial judge has discretion to order pretrial discovery only as permitted by supreme court rule. This inherent power could not authorize the trial court order presently at issue.

We reject the argument that Supreme Court Rule 413 requires the investigator's reports to be turned over upon timely request. In relevant part, Rule 413 reads as follows:

"(d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:

(i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, an[y] record of prior criminal convictions known to him; and

(ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;

* * *

(e) Additional Disclosure. Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule." 87 Ill. 2d R. 413.

3. The trial court properly rejected application of subsection (d)(i) in the present case, because the reports at issue do not summarize statements of defense witnesses.

Nevertheless, the trial court did find that subsection (d)(ii) of Rule 413 authorized discovery of the reports. This determination was erroneous. The State contends, in essence, that the "papers" referred to in subsection (d)(ii) include the reports at issue in this case. The State's argument would interpret subsection (d)(ii) as a "catchall" provision—permitting discovery of items admittedly prepared by the defense in anticipation of litigation, but which do not qualify as expert's reports under subsection (c), nor as defense witness statements under subsec-

tion (d)(i). (87 Ill. 2d R. 413(c), (d)(i).) Giving "papers" the broad definition which the State's interpretation requires ignores the existence of the subsection (e) "catchall" provision. Moreover, such broad interpretation would vitiate the work product doctrine as set forth in Supreme Court Rule 412(j). We reject an interpretation with such far-reaching consequences.

In the present context, ordering discovery under Rule 413 raises a further problem in that defense counsel asserts that these notes would not be used to impeach the State's witnesses. At most, counsel states, the notes will be used to refresh the defense investigator's recollection if he testifies as an impeaching witness. Accordingly, the notes would not be material intended to impeach prosecution witnesses as contemplated by Rule 413(d)(ii).

Finally, we conclude that the trial court's order does not fall within its discretion to permit additional discovery by the State under Rule 413(e). In interpreting the parallel catchall provision relating to discovery by the defense (87 Ill. 2d R. 412(h)), the appellate court has noted that this "discretionary provision was intended to have a small scope." (*People v. Manley* (1974), 19 Ill. App. 3d 365, 370, 311 N.E.2d 593, 597.) We believe the discretion provided for in Rule 413(e) should also be given a limited reading. The defense investigator's reports do not contain factual information not otherwise obtainable by the prosecution; their only value is to cross-examine the defendant's investigator should he take the stand. In the present case, the sought-after reports will be irrelevant unless and until the defendant's investigator testifies to impeach one of the State's witnesses. Unless that juncture is reached, the reports would merely give the State's Attorney insight into defense counsel's approach to Stanley Boclair's defense. Although the trial court's order may serve expendi-

ency by permitting trial to continue without interruption if the defendant's investigator testifies, such considerations should not permit otherwise prohibited discovery. The State's Attorney has access to each person the defense has interviewed. He is not also entitled to use the effort of defense counsel to shore up weaknesses in his case or to uncover new avenues of inquiry. Acquiring the relevant portions of these reports at trial will adequately preserve the State's interest in answering impeachment of prosecution witnesses.

4. We also agree with Pelz that the materials at issue fall within the so-called work product privilege. Illinois does not generally require either the State or the defense to disclose its work product to the other before the trial. Supreme Court Rule 412(j)(i) prevents disclosure of "records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff." (87 Ill. 2d R. 412(j)(i).) This rule clearly protects a report written by a defense investigator as if the defense attorney prepared the document himself. See also *People v. Knippenberg* (1977), 66 Ill. 2d 276, 362 N.E.2d 681.

The investigator's report at issue in the present case is quite similar to the report at issue in *Consolidation Coal Co. v. Bucyrus-Erie Co.* (1982), 89 Ill. 2d 103, 432 N.E.2d 250. In *Consolidation Coal*, the Illinois Supreme Court rejected the argument that notes and reports of an attorney's interviews with employees of his corporate client were not protected under the work product doctrine simply because those notes contained primarily factual information. The supreme court found that "notes regarding oral statements of witnesses, whether in the form of attorney's mental impressions or memoranda,

necessarily reveal in varying degrees the attorney's mental processes in evaluating the communications. [Citations.]" (89 Ill. 2d 103, 109, 432 N.E.2d 250, 253.) In the present case, an investigator took notes of interviews conducted under the direction of defense counsel. As in *Consolidation Coal*, these notes and subsequent reports inevitably reflect defense counsel's evaluations and strategy—protection of which is the very heart of the work product doctrine. Although *Consolidation Coal* addresses discovery in the context of civil litigation, the concerns that case addresses are even more acute in the context of a criminal prosecution.

Likewise, the present case does not fall within the exception to the work product doctrine as expounded in *Consolidation Coal*. Because an attorney's notes and memoranda might, "on rare occasions, constitute the only source of factual material," the supreme court determined that an exception to the work product doctrine must be made in such instances. (*Consolidation Coal Co. v. Bucyrus-Erie Co.* (1982), 89 Ill. 2d 103, 111, 432 N.E.2d 250, 253.) In the present case, we are dealing with interviews of State witnesses. Presumably, the prosecution has as much, if not more, access to any information these witnesses have. Moreover, the State's primary interest in these reports is assertedly for their impeachment value should the defendant's investigator take the stand. We are not persuaded that these reports fall within the narrow exception to the work product doctrine permitting discovery of factual matters unavailable from other sources.

5. Despite our determination that the work product doctrine protects the reports at issue from pretrial discovery, the trial court may order them turned over to the prosecution should the defense use the investigator's

testimony to impeach State witnesses. If the defendant's investigator testifies to impeach prosecution witnesses, the defendant will have waived the protection of the work product rule and may be required to turn over to the State any portion of these reports relevant to cross-examining the investigator. (*United States v. Nobles* (1975), 422 U.S. 225, 45 L. Ed. 2d 141, 95 S. Ct. 2160; *People v. Grier* (1980), 90 Ill. App. 3d 840, 413 N.E.2d 1316.) The defendant recognizes this rule and offers, in his brief before this court, to turn over any relevant materials if his investigator testifies to impeach State witnesses.

We find no merit in the State's contention that fairness or reciprocity requires defense counsel to turn over his investigator's reports before trial. Supreme Court Rule 413 provides liberal discovery privileges to the prosecution, and we see no reason to enhance those rights under the circumstances of this case. Moreover, even if the State's discovery rights do not precisely parallel those of the defendant, any tilt of the balance toward the defense accords with the notion that the prosecutor represents all the people of Illinois including the defendant, while defense counsel is advocate only for his client. The State's primary goal must be justice, while defense counsel looks primarily to his client's interests.

Similarly, we do not face a situation like that presented to the supreme court in *Williams v. Florida* (1970), 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893. In *Williams*, the high court upheld a Florida rule requiring the defendant to inform prosecutors if an alibi defense was anticipated, name the place defendant claimed to have been, and provide names and addresses of defense alibi witnesses. The alibi defense is distinguishable from the reports at issue here by the ease with which a defendant

can fabricate an alibi. Likewise, unless the defendant discloses his alibi witnesses, the State has no access to such information. By contrast, the information which the prosecution seeks in the present case is available without the defendant's cooperation since it comes from witnesses whom the State originally identified. Although the efforts of defense counsel might provide a short cut for the prosecution's investigators, simple efficiency is not enough to justify compelling this discovery.

For the foregoing reasons, the contempt citation of Joel T. Pelz is reversed and the cause remanded for further proceedings.

Reversed and remanded.

WEBBER and SPITZ, JJ., concur.

APPENDIX E

STATE OF ILLINOIS
SUPREME COURT CLERK
SUPREME COURT BUILDING
SPRINGFIELD 62706

Juleann Hornyak
Clerk of the Court
(217) 782-2035

First District Office
Room 30-129
Richard J. Daley Center
Chicago 60602
(312) 793-1332

February 20, 1987

[No. 63132—People State of Illinois, appellant, v. Stanley Boclair, appellee. Appeal, Appellate Court, Fourth District.]

The mandate(s) of this Court will issue to the Appellate Court, Circuit Court or other Agency on March 20, 1987, unless a petition for rehearing (due March 13, 1987) or motion to stay the mandate is timely filed. Supreme Court Rule 368.

APPENDIX F

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

March 30, 1987

Mr. Joel T. Pelz
Jenner and Block
One IBM Plaza
Chicago, IL 60611

No. 63132—People State of Illinois, appellant, v. Stanley Boclair, appellee. Appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for rehearing in the above entitled cause.

Simon, J., took no part.

The mandate of this Court will issue to the appropriate Appellate Court and/or Circuit Court or other agency on April 9, 1987.

APPENDIX G

IN THE SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,	)	
v.	)	No. 63132
STANLEY BOCLAIR, Defendant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Stanley Boclair, the defendant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Illinois entered on February 20, 1987, rehearing of which was denied on March 30, 1987, which reversed the decision of the Illinois Appellate Court in *People v. Boclair*, 139 Ill. App. 3d 350, 487 N.E.2d 969 (1985), and reinstated the trial court's civil contempt citation.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Jerold S. Solovy
John H. Mathias, Jr.
Barry Sullivan
Joel T. Pelz
Jeffrey T. Shaw
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

/s/ Barry Sullivan
One of the Attorneys for
Defendant Stanley Boclair

Filed
May 26, 1987
Supreme Court Clerk

CERTIFICATE OF SERVICE

I, Barry Sullivan, a member of the Bar of the Supreme Court of the United States, certify that I have served the foregoing Notice of Appeal to the Supreme Court of the United States by depositing it in a United States mailbox at One IBM Plaza, Chicago, Illinois 60611 on May 20, 1987, with first class postage prepaid, to the following:

Neil F. Hartigan
Attorney General, State of Illinois
Roma J. Stewart
Solicitor General, State of Illinois
Mark L. Rotert
Scott Graham
Assistant Attorneys General
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601

Donald D. Bernardi
State's Attorney for Livingston County
Livingston County Courthouse
Pontiac, Illinois 61764

Judith Cremer
Clerk of the Circuit Court
Livingston County Courthouse
Pontiac, Illinois 61764

I further certify that all parties required to be served have been served.

/s/ Barry Sullivan
Barry Sullivan

APPENDIX H

No. 63132

IN THE
SUPREME COURT OF ILLINOIS

People State of Illinois, Appellant	)	Appellate Court Fourth District 4-85-0384
v.	)	
Stanley Boclair, Appellee	)	

ORDER

This matter has come for consideration upon the motion of Appellee to stay the mandate of this Court pending appeal or application for *certiorari* in the United States Supreme Court.

IT IS ORDERED that the mandate of this Court in the above cause is stayed pending the filing of a notice of appeal or an application for *certiorari* or the expiration of the period within which said application or notice may be filed. If *certiorari* is applied for or notice of appeal filed, the mandate of this Court shall, upon proof of such filing being made by affidavit filed with the clerk of this Court, be further stayed pending resolution by the United States Supreme Court of such application or appeal. If no such affidavit is filed, the mandate shall, without further order, issue upon the expiration of the time within which appeal or *certiorari* may be sought.

Ben Miller
Justice, Supreme Court of Illinois

Entered: April 14, 1987

Supreme Court, U.S.
FILED
OCT 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STANLEY BOCLAIR and JOEL T. PELZ,

Appellants,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM

NEIL F. HARTIGAN
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State's Attorney of Livingston County
Pontiac, Illinois
Of Counsel

* Counsel of Record

Printed by Authority of the State of Illinois (P.O. 33837—55—10-9-87)

QUESTIONS PRESENTED

1. Whether the Illinois Supreme Court's decision granting the parties in a criminal case reciprocal discovery rights of verbatim statements describing the crime violates an accused's federal constitutional rights.

2. Whether a verbatim statement describing a crime constitutes work product.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STANLEY BOCLAIR and JOEL T. PELZ,

Appellants,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM

The People of the State of Illinois, appellee in this cause, move this Court to dismiss the present appeal or, in the alternative, to affirm the judgment of the Illinois Supreme Court, for the following reasons:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall * * * be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law * * *.

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Supreme Court Rule 413, Ill. Rev. Stat. ch. 110A, § 413, provides in pertinent part:

> Disclosure to Prosecution
>
> * * *
>
> (d) Defenses. Subject to constitutional limitations and within a reasonable time after the filing of a written motion by the State, defense counsel shall inform the State of any defenses which he intends to make at a hearing or trial and shall furnish the State with the following material and information within his possession or control:
>
> (i) The names and last known addresses of persons he intends to call as witnesses together with their relevant written or recorded statements, including memoranda reporting or summarizing their oral statements, any record of prior criminal convictions known to him; and
>
> (ii) any books, papers, documents, photographs, or tangible objects he intends to use as evidence or for impeachment at a hearing or trial;
>
> (iii) and if the defendant intends to prove an alibi, specific information as to the place where

he maintains he was at the time of the alleged offense.

(e) Additional disclosure. Upon a showing of materiality, and if the request is reasonable, the court in its discretion may require disclosure to the State of relevant material and information not covered by this rule.

Illinois Supreme Court Rule 412, Ill. Rev. Stat. ch. 110A, § 412, provides in pertinent part:

Disclosure to Accused

(a) Except as is otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:

(i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion of defense counsel memoranda reporting or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel;

(ii) any written or recorded statements and the substance of any oral statements made by the accused or by a codefendant, and a list of witnesses to the making and acknowledgment of such statements;

(iii) a transcript of those portions of grand jury minutes containing testimony of the accused and relevant testimony of persons whom the

prosecuting attorney intends to call as witnesses at the hearing or trial;

(iv) any reports or statements of experts, made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert;

(v) any books, papers, documents, photographs or tangible objects which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belong to the accused; and

(vi) any record of prior criminal convictions, which may be used for impeachment, of persons whom the State intends to call as witnesses at the hearing or trial.

If the State has obtained from the defendant pursuant to Rule 413(d) information regarding defenses the defendant intends to make, it shall provide to defendant not less than 7 days before the date set for the hearing or trial, or at such other time as the court may direct, the names and addresses of witnesses the state intends to call in rebuttal, together with the information required to be disclosed in connection with other witnesses by subdivisions (i), (iii) and (vi), above, and a specific statement as to the substance of the testimony such witnesses will give at the trial of the cause.

* * *

STATEMENT OF THE CASE

Stanley Boclair was charged in a November 1, 1984, indictment with four (4) counts of murder based on the killing of an inmate at the Pontiac Correctional Center.[1] (R.C. 1) On November 7, 1984, Boclair was arraigned and entered a plea of not guilty. (R.C. 1) The Livingston County Public Defender was appointed to represent Boclair and both parties moved for discovery. (R.C. 1, 8)

The prosecution's discovery motion requested, in part, that the defense disclose:

> Any books, papers, documents, photographs, or tangible objects which the defense intends to use as evidence or for impeachment at hearing or trial.

(R.C. 8) During the process of discovery the prosecution listed over 200 potential witnesses, including approximately 140 prison inmates. (R.C. 2, 5)

On December 19, 1984, the trial court appointed the law firm of Jenner and Block as counsel for Boclair, and thereafter Joel T. Pelz from that firm has been one of the attorneys representing Boclair. Pursuant to the trial court's order, the defense was authorized to expend public funds for an independent investigator.

Pelz and defense investigator Anthony Matens then began interviewing many of the prosecution's witnesses, including some of the prison inmates. During those interviews, Matens took handwritten notes. (R.C. 30)

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[1] Boclair has been convicted of murder and sentenced to death.

On March 14, 1985, a hearing was held on a number of defense motions. When Mr. Pelz addressed defendant's motion for supplemental discovery, he noted that the first paragraph requested, "memoranda and notes of people who conducted the investigation, any of those that reflect oral statements given by a witness or a potential witness." (R. 9) Pelz stated "I believe that the defendant is entitled to those and certainly he is entitled to those if any of those are to the extent they would be in the effect of a summary or virtually a narrative of what the witness has told one of the investigators." (R. 9) The prosecution recognized that such material was discoverable and agreed that the motion should be allowed. (R. 9-10)

The prosecution then requested that the order be made reciprocal and requested to see the notes and memoranda prepared during interviews of prosecution witnesses. (R. Vol. 10) Specifically, the prosecution indicated that a number of its inmate witnesses had been interviewed by Matens and requested to see any factual statements contained in these interviews which were reduced to writing. (R. 10) The prosecution argued:

> Well, counsel is asking for the notes that we produced during the investigation and I am asking for the notes he has produc[ed] and as long as they are statements of witnesses, they are discoverable material and the reason they are discoverable is because discovery is intended to prevent surprise, and if I have to produce statements to the defense the purpose is not only for him to know what those witnesses may testify to but also, and more importantly and it is highly unfair and prejudicial to the State to put John Doe on the stand to testify to one thing according to the statements he gave us at the initial investigation and then cross-examine using statements that I have never seen before taken by either defense

> counsel or their investigators and it is that portion of the trial that concerns me. I don't want these people cross-examined regarding statements they made to defense counsel or investigators that I am not aware of. . . .

(R. 13-14)

The court ruled that statements of witnesses concerning the event were discoverable under Supreme Court Rule 413(d)(ii), and (e) and the inherent authority of the judiciary to regulate the administration of criminal justice. (R.C. 28-29)

The court initially noted that the credibility of inmate witnesses is of crucial concern for offenses allegedly occurring within a correctional institution, that inmates may be more likely than other witnesses to make inconsistent statements to several investigators, and that as a result the prosecution had made a strong case for discovery of such reports. (R.C. 25-26)

The court concluded an *in camera* inspection of the notes and it excised those portions which were work product. The court ordered the defense to disclose the names of persons interviewed and the portions of the notes which consisted of verbatim statements. (R.C. 31) Pelz refused to comply with the court's order and the court found him to be in contempt.[2] (R. 87)

Pelz appealed and the Illinois Appellate Court, Fourth District, reversed the contempt order, holding that the investigator's reports were work product and not discov-

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[2] The parties agree that Pelz was found to be in direct civil contempt.

erable before trial pursuant to Supreme Court Rule 413. (*Ill. Rev. Stat.*, 1981, ch. 110A, sec. 413) The court concluded that, at most, the notes could be used to refresh the defense investigator's recollection if he testified as an impeaching witness. The court stated that the notes would not be material intended to impeach prosecution witnesses as contemplated by Rule 413(d)(ii). The court stated:

> The defense investigator's reports do not contain factual information not otherwise obtainable by the prosecution; their only value is to cross-examine defendant's investigator should he take the stand. In the present case, the sought-after reports will be irrelevant unless and until defendant's investigator testifies to impeach one of the State's witnesses.

People v. Boclair, 139 Ill. App. 3d 350, 487 N.E.2d 969, 973 (4th Dist. 1985). The court also agreed with defendant that the material fell within the work product privilege and was thus protected from discovery. For these reasons the court reversed the contempt citation of defendant's attorney and remanded the cause for further proceedings.

The Illinois Supreme Court reversed the appellate court, interpreting Rule 413(c) to allow disclosure of the verbatim statements of prosecution witnesses. *People v. Boclair*, No. 63132. Pelz appeals the Court's decision.

REASONS FOR AFFIRMING THE JUDGMENT BELOW

I.

THE TRIAL COURT'S ORDER REQUIRING PRE-TRIAL DISCLOSURE OF STATEMENTS OF PROSECUTION WITNESSES MADE TO A DEFENSE INVESTIGATOR DID NOT DEPRIVE THE DEFENDANT OF ANY FEDERAL CONSTITUTIONAL RIGHT.

Prior to trial defendant moved for discovery of memoranda prepared by prosecution investigators which reflected oral statements given by prospective prosecution witnesses. Defense counsel argued:

> I believe that the defendant is entitled to those and certainly he is entitled to those if any of those are to the extent they would be in the effect of a summary or virtually a narrative of what the witness has told one of the investigators.

(R. 9) The prosecution agreed that any such statements were discoverable and requested that any discovery order to that effect be made reciprocal, thereby requiring defendant to disclose oral statements made by prosecution witnesses during interviews with defense investigator Matens. (R. 10) The prosecution argued that it would be unfair to allow the defense to cross-examine prosecution witnesses with statements which the defense had not disclosed. (R. 13-14)

The trial court ultimately ordered defendant to disclose the statements, finding that "to the extent that such reports contain statements of witnesses concerning the alleged event, it appears that those portions of such reports fall outside the work product exception." (R.C. 27-28) The

trial court then conducted an *in camera* inspection of the notes and ordered disclosure of those portions of the notes which did not constitute work product. (R.C. 31) Defense counsel's refusal to comply with the court's order led to counsel's citation for contempt. The Illinois Supreme Court approved the sanction, holding that discovery of the statements was proper under its rule 413(e). *Ill. Rev. Stat.*, 1983, ch. 110A, sec. 413(e).

Counsel now argues that this interpretation was incorrect because it deprived the defendant his Sixth Amendment right to effective assistance of counsel, his Fifth and Fourteenth Amendment protection from the disclosure of work product, and his Fifth and Fourteenth Amendment right against compelled assistance of the prosecution. (Jur. Stat. at 13) These claims fail for a number of reasons. Most obviously, verbatim statements describing a crime are not work product because they do not include the mental impressions of defense counsel or any other member of the defense team. In addition, disclosure of the statements does not require the accused to assist the prosecution because any consistent statements merely duplicate the prosecution's information, and, as defendant recognizes, any inconsistent statements are discoverable as potential impeachment. For these reasons, defendant has failed to present a substantial federal question to this Court which would justify the exercise of the Court's jurisdiction.

Illinois Supreme Court Rule 412(j)(i) prevents the pretrial disclosure of "records, correspondence, reports or memoranda to the extent that they contain the opinions, theories, or conclusions of the State or members of its legal or investigative staffs, or of defense counsel or his staff." *Ill. Rev. Stat.*, 1983, ch. 110A, sec. 412(j)(i). The

prosecution has agreed throughout these proceedings that any work product contained in the defense investigator's reports or notes was protected during pre-trial proceedings by Rule 412(j)(i). *People v. Knippenberg*, 66 Ill. 2d 276, 362 N.E.2d 861 (1977).

The Court below determined that prospective witness statements describing a criminal incident are not work product, and, because such statements constitute potential impeachment, are discoverable prior to trial. (*People v. Boclair*, No. 63132, Appellant's Appendix at 6) The People contend that the decision does not violate any right guaranteed by the federal constitution.

In *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947), this Court noted that an attorney's trial preparation materials retain a qualified immunity during pretrial civil discovery. The great majority of states now offer work product protection to both the prosecution and defense in criminal litigation, and courts have relied on civil precedent in criminal work product cases. Feldman, Steven., "*The Work Product in Criminal Practice and Procedure*", 50 U. Cin. L. Rev. 495, 506 (1981).

However, it is clear that absent a constitutional privilege, statute, or rule, the defense in a criminal case has no valid interest in pretrial concealment of relevant information from the prosecution. *Jones v. Superior Court.* 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962).

In *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975), this Court considered the problems arising in a criminal trial in which defense counsel sought to impeach the credibility of key prosecution witnesses with the testimony of a defense investigator regarding statements previously obtained from the witnesses by the

investigator. The factual circumstances in *Nobles* are thus very close to the present case. The issue there was whether the federal trial court could compel the defense to reveal the relevant portions of the investigator's report for the prosecution's use in cross-examining him. An investigator for Nobles had interviewed two prosecution identification witnesses and preserved the essence of those conversations in a written report. After the witnesses testified, the defendant attempted to call the investigator as a defense witness, but the trial court said that an edited *in camera* copy of the report would have to be submitted to the government at the close of the investigator's impeachment testimony. Defense counsel refused to produce the report and the trial court precluded the investigator's testimony. This Court found that the investigator's report was highly relevant to the critical issue of credibility, and that its production would enhance the search for truth. *Id.* 95 S.Ct. at 2167. The Court states that the work product doctrine is not an absolute privilege but may be waived like other qualified privileges. The Court found that the defendant waived any work product privilege by calling the investigator to testify to matters covered in the report. The Court held that the production of a defense investigator's witness report after the investigator has testified at trial complies with the defendant's privilege against compulsory self-incrimination. 95 S.Ct. at 2168.[3]

[3] In an earlier case, the Supreme Court in *United States v. Jencks*, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957), ordered disclosure of prior statements of all government witnesses, partly out of fear of fabrication or misstatement by the government's professional witnesses. The *Jencks* court said that to deny disclosure of prior statements which might be used to impeach the witness was to "deny the accused evidence relevant and material to his defense" and also rejected as unrealistic any rule that would re-

(Footnote continued on following page)

In his concurring opinion in *Nobles*, Mr. Justice White considered the basis for protection of the investigator's notes. Justice White noted that decisions have largely confined the work product rule to its role as a limitation in pretrial discovery. He stated that although a party seeking to discover a statement made to an opposing party in order to prepare for trial can often obtain the "substantial equivalent" by interviewing the witness himself, a prior inconsistent statement in the possession of his adversary is unique. 95 S.Ct. at 2175. Even in *Hickman v. Taylor, supra*, the Court recognized that discovery may be had of relevant and nonprivileged facts in an attorney's file if necessary to the preparation of a case. The *Hickman* court said such written statements or documents "might be useful for *purposes of impeachment* or corroboration." 67 S.Ct. at 394 (emphasis added). Justice White concluded that the work product rule of *Hickman v. Taylor* had no application to the request at trial for evidentiary and impeachment material. 95 S.Ct. at 2178. In fact, it has been persuasively argued that Justice White strongly intimated that the interest of the jury in obtaining all relevant information should outweigh any work product considerations. Scheininger, 14 Am. Crim. Law Rev. at 12. The People agree with such a position.

In *Goldberg v. United States*, 425 U.S. 94, 96 S.Ct. 1338, 1342, 47 L.Ed.2d 603 (1976), the Court held that a writing prepared by a government lawyer relating to the subject

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[3] *continued*
quire the defendant to demonstrate the impeachment value of prior statements before disclosure. 77 S.Ct. at 1013. *Nobles* should have a comparable interpretation as *Jencks*, with "full disclosure" of all relevant facts. Scheininger, Michael G., "*United States v. Nobles: A Prosecutor's Perspective*," 14 Am. Crim. L. Rev. 1, 6 (1976).

matter of the testimony of a government witness is producible under the *Jencks* Act and is not rendered nonproducible because a government lawyer interviews the witness and writes the statement. The Court found nothing in the *Jencks* Act or its legislative history that excepts from production otherwise producible statements on the ground that they constitute "work product" of government lawyers. 96 S.Ct. at 1344. The *Goldberg* court cited *United States v. Nobles, supra,* in concluding that the primary policy underlying the work product doctrine, the protection of the privacy of an attorney's mental processes, is adequately safeguarded by the *Jencks* Act itself. 96 S.Ct. at 1346. The *Nobles* decision cited numerous cases in which the Court had repeatedly recognized a court's inherent power to require the prosecution to produce the previously recorded statement of its witnesses so that the defense may get the full benefit of cross-examination and the truth-finding process may be enhanced. 95 S.Ct. at 2166.

Since the prosecution's concern is for impeachment purposes which is an exception recognized under *Hickman,* and since the trial judge excluded from disclosure any material relevant to the attorney's opinion or trial strategy, the trial court properly ordered defendant to disclose the verbatim statements obtained from prosecution witnesses.

II.

RECIPROCAL DISCOVERY OF VERBATIM STATEMENTS BY PROSPECTIVE WITNESSES DESCRIBING THE CRIME DOES NOT DEPRIVE THE ACCUSED HIS RIGHTS TO DUE PROCESS OF LAW OR EFFECTIVE ASSISTANCE OF COUNSEL.

Illinois courts have correctly determined that pretrial discovery in criminal cases is designed to promote the truthfinding process and to eliminate surprise as a tactical advantage for *either* side. *People v. Caliendo,* 84 Ill. App. 3d 987, 40 Ill. Dec. 41, 405 N.E.2d 1133 (1st Dist. 1980). To further this goal, Illinois Supreme Court Rule 412(a)(i) provides:

> (a) Except as otherwise provided in these rules as to matters not subject to disclosure and protective orders, the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements. Upon written motion or summarizing oral statements shall be examined by the court *in camera* and if found to be substantially verbatim reports of oral statements shall be disclosed to defense counsel; . . .

Ill. Rev. Stat., 1981, ch. 110A, sec. 412(a)(i).

Thus, the prosecution is required to disclose to the accused not only the names of witnesses it intends to call, but also written statements and memoranda containing

substantially verbatim reports of their oral statements. Compliance with this rule is mandatory, being excused only if the prosecution was unaware of the existence of a statement prior to trial. See *People v. Boucher*, 62 Ill. App. 3d 436, 19 Ill. Dec. 675, 379 N.E.2d 339 (3rd Dist. 1978).

In *People v. Szabo*, 94 Ill. 2d 327 (1983), the defendant sought discovery of "substantially verbatim reports of [the] oral statements of a prosecution witness" pursuant to *Ill. Rev. Stat.*, 1981, ch. 110A, sec. 412(a)(i). *Id.* 94 Ill. 2d at 343. The prosecution informed the court that it destroyed the notes and the trial court did not order the prosecution to attempt to reconstruct them, finding that the disclosure of other written statements provided the defendant with adequate discovery. The Illinois Supreme Court disagreed, interpreting Rule 412(a)(i) to mean that the prosecution was required to disclose all the notes of its interviews with the witness for *in camera* inspection by the trial court, which would redact all privileged material and pass on to defendant "any unprivileged, substantially verbatim statements. . ." *Id.* 94 Ill. 2d at 345.

In the present case, as well as in *People v. Lego*, ___ Ill. 2d ___, 507 N.E.2d 800 (1987), the Court applied this reasoning to the prosecution's discovery rights. *People v. Boclair*, No. 63132, Appellant's Appendix at 6; *People v. Lego, supra*, 507 N.E.2d at 805.

Commentators have supported the provisions in the supreme court rules requiring disclosure by the defense to the prosecution:

> The rationale for discovery against the defense is the same as that underlying discovery against the prosecution. Discovery eliminates surprise and allows a superior opportunity to probe for truthfulness.

Zagel and Carr, 1971, U. Ill.L.F. 557, 584.

The ruling below is supported by a common sense principle of reciprocity, since defense counsel had already requested and been granted access to statements of witnesses given to prosecution investigators. The prosecution agreed that such statements regarding the event were discoverable and agreed to furnish typewritten notes and whatever handwritten notes were available. (R. 10-11) Without such reciprocity, criminal discovery would be a one-way street in favor of the defendant. This Court certainly does not intend such a result.

Defendant first argues that the Court's ruling would deprive him of the effective assistance of counsel because it would interfere with counsel's ability to prepare a defense.[4] (Jur. Stat. at 15-16) It is difficult to imagine how disclosure of verbatim statements describing a crime would interfere with an accused's effort to prepare a legitimate defense. If the statement proves inconsistent, the prosecution is entitled to its disclosure, and, if the statement is consistent with the prosecution's expectations, then the defendant has not been prejudiced.

Defendant's argument that "the State sought to use defense counsel to obtain additional information to bolster its case . . ." (Jur. Stat. at 17), misunderstands the purpose of the prosecution's request. The prosecution actually sought only information which would impeach its witnesses. In this regard, the prosecution would be fully informed of which witnesses would prove detrimental to its case.

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[4] Defendant argues that "[t]he right to effective assistance of counsel is even more important in a death-eligible case like the present one." (Jur. Stat. at 16, n.9) However, this Court formulated the standard for review in the context of a capital case. See *Strickland v. Washington*, 466 U.S. 668 (1984).

Defendant incorrectly argues that the prosecution had equivalent access to the information. (Jur. Stat. at 15) The prosecution had no access to information disclosed outside its presence.

Defendant fails to present a compelling attack against the decision below. Instead, it is clear that the present situation involves a state court's application of its own discovery rules in a manner which does not diadvantage the accused or contravene any of the accused's federal constitutional rights. This Court should decline review of this cause.

CONCLUSION

For these reasons, appellee requests this Court to dismiss this cause because appellant has failed to state a substantial federal question.

Respectfully submitted,

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No. 87-10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

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Appellants,

v.

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Appellee.

On Appeal From The Supreme Court Of Illinois

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

Appellants respectfully submit this memorandum in opposition to the State's motion to dismiss or affirm.

1. In its spurious attempt to show that this case does not present a substantial federal question (*see* M.D. 10, 18),[1] the State misstates the record in at least four separate and significant respects. First, the State misleads the Court by asserting, both in the text of its motion and in

[1] "M.D." refers to the State's motion to dismiss or affirm filed in this Court. "J.S." and "J.S. App." refer to the jurisdictional statement and the appendix annexed thereto. "Tr." refers to portions of proceedings before the trial court that are a part of the record on appeal. "R." refers to the common law record. "Def. Br." refers to the brief filed by appellants in the Illinois Supreme Court.

its restatement of the questions presented, that the interview notes involved in this case are "verbatim" statements. (M.D. i, 10.) No court below made any such finding, and the State's assertion is simply untrue. A "verbatim" statement is one in the speaker's "exact words; word for word." *Webster's Ninth New Collegiate Dictionary* 1309 (1986). The notes involved here are not verbatim statements under Webster's, or anyone else's, definition. The interviews ranged from 30 minutes to three and one-half hours in duration, and the notes for each witness interview range from approximately 15 to 300 words.[2] The decision as to what should be included, and what should be excluded, was in each case dictated by the thought processes and strategies of the defense, and none of the notes were reviewed or signed by any of the witnesses. (Tr. 80.) *Cf. Palermo v. United States*, 360 U.S. 343, 355 n.12 (1959) (agent's 600-word summary of conference lasting three and one-half hours "clearly not a verbatim narrative" and thus not subject to production under Jencks Act).

Second, the State asserts (M.D. 11) that the court below approved *pretrial* discovery limited to "impeachment" materials—truly a logical impossibility before any trial testimony was heard. Moreover, the terms of the trial court's order were not limited to impeachment materials (R. 31), and the Illinois Supreme Court made clear (J.S. App. 5) that an additional purpose of this pretrial discovery was to guide the State in restructuring and perfecting its case against the defendant.

Third, the State contends (M.D. 17) that the ruling below does not interfere with counsel's Sixth Amendment duty to prepare the defense because *all* of the defense

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[2] The interview notes are part of the record on appeal. (R. 30.)

notes must either be consistent or inconsistent with the statements given to the State. The State's contention is illogical because it assumes: (1) that the State interviewed all of the 200 persons it designated as potential trial witnesses, and (2) that the only questions asked by the defense team were questions that the State also asked. Those assumptions are contrary both to general human experience and to the historical facts of this case. The defense asked numerous questions concerning subjects that were particularly relevant to its theory of the case, but were not explored at all by the State. By naming over 200 potential witnesses (J.S. 7), and then seeking to obtain the notes pertaining to all State "witnesses" interviewed by the defense team (while knowing that it intended to call fewer than 20 witnesses at trial), the State sought to force the defendant to assist in the preparation of the case against him. Indeed, the State did little more than identify the field to be harvested, and then placed on the defendant both the burden of separating the wheat from the chaff and the burden of delivering the wheat to the prosecution. Under the Constitution, those burdens simply cannot be placed on the defendant.

Finally, the State contends (M.D. 17) that the decision below is "fair" because it allows "reciprocal" discovery. One well might question whether a rule of "reciprocity" has any place in our criminal adversary system,[3] but that

[3] The State's reciprocity argument misconceives the different roles played by prosecuting and defense counsel. Defense counsel owes his undivided loyalty to his client, and, consistent with ethical obligations, should "serve as the accused's counselor with courage [and] devotion." American Bar Association Standards for Criminal Justice 4-1.1(b) (1980). In contrast, the government's interest " 'is not that it shall win a case, but that justice shall be done.' " *Young v. United States ex rel. Vuitton Et Fils S.A.*, ____ U.S. ____, ____, 107 S. Ct. 2124, 2135 (1987) (*quoting Berger v. United States*, 295 U.S. 78, 88 (1935)).

question is of no moment here because the State sought discovery far in excess of that which was sought (or legally obtainable) by the defense. Under a "reciprocal" discovery principle, the State would have been entitled to discover statements made by *defense* witnesses.[4] What the State demanded were notes taken during defense interviews with *State* witnesses. The Illinois Supreme Court's broad, virtually unlimited expansion of discovery goes far beyond reciprocity and violates due process.

2. The State also misstates the case decisions which it cites (M.D. 11-14) in support of the decision below. In *Hickman v. Taylor*, 329 U.S. 495, 511 (1947), this Court recognized that disclosure of an attorney's memoranda would necessarily reveal the attorney's strategies, legal theories, and mental impressions, thereby creating unfairness, subverting confidence in the judicial system, and demoralizing the profession. The instant case epitomizes the dangers which led this Court to establish the work product doctrine in *Hickman*.

Similarly, *United States v. Nobles*, 422 U.S. 225 (1975), provides no support for the wholesale discovery ordered in this case. *Nobles* does not even address the issue of *pretrial* discovery, which is the only matter at issue here. Instead, *Nobles* holds that the State—even at trial—is entitled only to limited discovery of an investigator's notes, *if and when* the investigator takes the stand. *Id.* at 239. Appellants have consistently and repeatedly expressed their willingness to follow the *Nobles* procedure, but the

[4] Illinois Supreme Court Rule 413(d)(i) allows the State to discover defense witness statements. The courts below all agreed that the State's request went beyond the scope of Rule 413(d)(i). (J.S. App. 11, 17.)

State consistently and repeatedly has refused to be bound by it. (J.S. 21-22.)

The State's reliance (M.D. 12-14) on *Jencks v. United States*, 353 U.S. 657 (1957), and *Goldberg v. United States*, 425 U.S. 94 (1976), is also misplaced. Both cases (unlike the case at bar) pertain to production *at trial*, not *before trial*. In addition, they both address the duties of the prosecutor, not the fundamentally different obligations of defense counsel. *See* page 3, note 3, *supra*. Moreover, the Jencks Act, 18 U.S.C. § 3500 (1982), which Congress passed in the wake of the *Jencks* case, and which was the controlling law in *Goldberg*, allows discovery of governmental witness statements only after the witness has testified at trial, and, even then, requires production only of impeachment materials.

No prior decision of this Court approves the kind of expansive, pretrial disclosure that has been ordered in this case. Given the constitutional infirmities of any such compelled disclosure, there is little wonder that no such precedent exists.[5]

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[5] In an attempt to bolster its argument, the State even relies upon a California case which has been overruled, a fact which appellants pointed out when the State relied on it below. (*See* Def. Br. 36-37 n.18.) The case is *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), which the State cites for the proposition that "the defense in a criminal case has no valid interest in pretrial concealment of relevant information from the prosecution." (M.D. 11.) The California Supreme Court limited *Jones* to its facts in *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970), and fully discredited it in *People v. Collie*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981), and *In re Misener*, 38 Cal. 3d 543, 698 P.2d 637, 213 Cal. Rptr. 569 (1985). Since the State's continued, intentional reliance on overruled precedent speaks for itself, we offer no further comment.

3. Finally, the State fails to address several of appellants' central arguments. First, the State does not deny that the decision below conflicts with this Court's decision in *Wardius v. Oregon*, 412 U.S. 470 (1973). (*See* J.S. 14, 23-24.) The State simply ignores *Wardius*. Second, the State does not deny that the decision below conflicts with *State v. Williams*, 80 N.J. 472, 404 A.2d 34 (1979). (*See* J.S. 13-14, 26-28.) Again, the State simply ignores the decision. By doing so, the State effectively concedes the existence of a substantial federal question which requires plenary review by this Court.

It is respectfully submitted that the motion to dismiss or affirm should be denied and that probable jurisdiction should be noted.

Respectfully submitted,

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